STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED July 26, 2005
v	No. 260967 Kent Circuit Court
DIMENSION FURNITURE FRAME, INC., and KEITH BENTLEY, Defendants-Appellees.	LC No. 04-003625-CZ

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order denying its motion for summary disposition and entering judgment in favor of defendants. We affirm.

Plaintiff brought this declaratory judgment action to determine whether its general liability insurance policy covered an injury to defendant Bentley. Plaintiff seeks a determination on the extent of both its duty to defend and its duty to indemnify. This case arose when defendant Bentley injured his hand on a wood planer while at the workshop of defendant Dimension Furniture Frame, Inc.

Richard Kirchhoff, an owner of Dimension Furniture Frame, testified in his deposition that a long-time friend, Dave Weindorf, suggested that he hire defendant Bentley. Weindorf's wife Linda spoke to Bentley about the job and advised Kirchhoff that Bentley was "a little apprehensive as to what he would be doing, not knowing if he could even do that." Kirchhoff told Linda "we sure could show him. You know, he should come out and take a look at it." Kirchhoff scheduled Bentley to come in for training on how to run the planer, but he did not actually offer Bentley the job, and Bentley did not actually accept it.

When Bentley arrived at the shop, he first helped move some lumber and gather some wood for planing. Kirchhoff noted that during his training, Bentley "was told . . . three times, . . . 'Don't ever stick your hand in that machine.' I gave him a stick. 'I don't care if it's running or not, turn it off if you're ever going to do anything because you can get sliced on knives.'" Bentley worked with Phillips for two hours at the planer, and then Phillips took a lunch break. After lunch, the two men resumed working on the planer. Bentley was working "on the out-feed of the table where he was supposed to be because he was not running the machine," which was being done by Phillips. At some point Phillips went to the office to speak to Kirchhoff, leaving

Bentley "standing at the out-feed of the table," which did not have any wood running through it. While Kirchhoff and Phillips were talking, Bentley somehow ran his hand against the machine's blades, injuring himself. Kirchhoff testified that the blades on the planer are covered by "housing," and the only way to cut yourself is to lift the housing "and stick your hand in there . . . ." When Kirchhoff walked up, he noticed that the vacuum hose blocking the housing at the dust-collection port had been moved, and the housing had been lifted up. Bentley later apologized for the accident.

Bentley sued Dimension, alleging that it was negligent for allowing him to use a dangerous machine when he was not employed there and without properly training him, for allowing him to use a machine that was not equipped with appropriate safety devices, and for violating applicable safety regulations. Plaintiff, Dimension's liability insurer, filed this action seeking a declaration that it is not obligated to defend or indemnify Dimension.

Under the policy, plaintiff is required to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Among the listed exclusions are the following:

> d. Any obligation of the insured under a worker's compensation, disability benefits or unemployed compensation law or any similar law.
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> e. "Bodily injury" to:
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> (1) An employee of the insured arising out of and in the course of employment by the insured[.]
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> * * *
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> This exclusion applies:
>
> (1) Whether the insured may be liable as an employer or in any other capacity . . . .
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> * * *
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> o. "Bodily injury" arising out of any:
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> (1) Refusal to employ;
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> (2) Termination of employment;
>
> (3) Coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or other employment-related practices, policies, acts or omissions; or
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> (4) Consequential "bodily injury" as a result of (1) through (3) above.
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> This exclusion applies whether the insured may be held liable as an employer or in any other capacity . . . .

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that coverage was precluded under one or more of the above exclusions because "Bentley's injuries arose out of and in the course of his employment . . . with Dimension." Plaintiff asserted that even if Bentley was not an employee, he was injured while "being trained as an employee" or at least "being evaluated for a job." Bentley responded that none of the cited exclusions applied because he was not seeking payment of the excluded benefits and was not an employee. In addition, Bentley argued that the underlying complaint sought damages not for employment-related practices but for negligence. The trial court issued a written opinion and order granting summary disposition in favor of defendants. The trial court ruled that Bentley was not an employee of Dimension. The trial court also held that exclusion (o)(3) was ambiguous because the term "evaluation" could mean the evaluation of an employee's job performance or the evaluation of a candidate for employment. The trial court resolved the ambiguity in favor of coverage.

We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). "When determining what the parties' agreement is, the trial court should read the contract as a whole and give meaning to all the terms contained within the policy." *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). If a term is not defined in the policy, a court should interpret it according to its ordinary, commonly used meaning. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). "Clear and unambiguous language may not be rewritten under the guise of interpretation . . . ." *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). "Courts must be careful not to read an ambiguity into a policy where none exists." *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). "A policy is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. If the trial court determines that the policy is ambiguous, the policy will be construed against the insurer and in favor of coverage." *Royce*, *supra* at 542-543 (citations omitted). The construction and interpretation of an insurance policy and whether the policy language is ambiguous are questions of law that are reviewed de novo on appeal. *Henderson*, *supra* at 353.

In this case, the trial court relied on our holding in *Meridian Mut Ins Co v Wypij*, 226 Mich App 276, 281; 573 NW2d 320 (1997), which suggests that courts should apply the economic realities test to determine whether an individual is an "employee" for purposes of an insurance contract when the contract does not define the term. After applying the test, the trial court determined that Dimension was not paying Bentley a wage, had no authority to fire or discipline him, and had little, if any, control over his activities. However, in *Meridian*, we recognized that the test is most useful as a tool to determine whether someone is an employee rather than an independent contractor. *Id*. We fail to see how it would assist a court in determining whether someone trying out for a position of employment is already an employee. Therefore, *Meridian* is distinguishable, and the economic realities test fails to provide any reliable guidance in this case. Rather, the case turns on the meaning of the terms "employee" and "employment" in the context of the contract.

According to *Random House Webster's College Dictionary* (2001), "employee" means "a person who has been hired to work for another." This comports with the common understanding that the term "employee" does not apply without some form of acceptance of a work relationship by both parties. Because Bentley has demonstrated that he had not yet accepted employment with Dimension, he was not "hired" at the time of the injury. Therefore, the application of the ordinary meaning of the term "employee" to these facts is at least ambiguous. Likewise, the term "employment" denotes a relationship between an employee and employer, so the phrase "employment-related" also has questionable applicability to the acts and omissions upon which Bentley bases his claims. While it may be reasonable to interpret the tryout as an "employment-related" exercise, the stricter interpretation of the language is equally plausible. In other words, it is reasonable to expect that the exclusion does not apply without an established relationship between an employer and employee – a relationship commonly called "employment." We agree with the trial court that the term "evaluation" is ambiguous, because it is inextricably tied to the ambiguous term "employment-related," which modifies the entire class of excluded activities. Because the vague and expansive term "employment-related" could be reasonably interpreted as inapplicable to the acts and omissions that Bentley claims led to his injury, the trial court did not err when it interpreted the contract in favor of the insured and granted defendants summary disposition. *Royce*, *supra*.

While we would find a sufficient "contract of hire" for purposes of the Workers Disability Compensation Act, MCL 418.101 *et seq.*,[1] Bentley has pleaded and presented evidence that he is not an "employee" for purposes of the insurance contract, which, of course, is an independent issue. The contract's use of the terms "employee" and "employment" carry their commonplace meaning, not the expansive meanings afforded to the terms under the act. See MCL 418.161. Therefore, reasonable minds could differ regarding the terms' application to Bentley and his informal relationship to Dimension.[2] Because Bentley pleaded and presented evidence of a cause of action that is not expressly excluded by the insurance policy, plaintiff has a duty to defend and indemnify Dimension regardless of Bentley's ultimately meritless legal position. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 451; 550 NW2d 475 (1996).

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[1] This case falls squarely within the ambit of` the act, and the act affords Bentley his exclusive remedy. MCL 418.131(1). Because Bentley chose to "try out" the position, he assumed the status of an "employee" for the purposes of the act. *Moore v Gundelfinger*, 56 Mich App 73, 79-81; 223 NW2d 643 (1974). Therefore, the act applies notwithstanding the extremely informal and implied nature of the underlying "contract of hire" required by MCL 418.161(l) and *Hoste v Shanty Creek Mgt Inc*, 459 Mich 561, 574-575; 592 NW2d 360 (1999). For worker's compensation purposes, it is sufficient that Bentley and Dimension exchanged their evaluations of one another to determine the desirability of forming a more permanent and mutually beneficial wage-for-services agreement. *Moore*, *supra*; cf. *Hoste*, *supra* at 575.

[2] This is not to say there is an issue of material fact. Unlike the situation in *St. Paul Fire & Marine Ins Co v Mich Mut Ins Co*, 469 Mich 905; 668 NW2d 903 (2003), the facts underlying this case are not in dispute.

Affirmed.

/s/ Peter D. O'Connell
/s/ Bill Schuette
/s/ Stephen L. Borrello